85-1145

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CLANCY WILLIAMS, LOY BEAN, ROBERT L. GILLIAN, and the CITY OF LAWTON, OKLAHOMA, a municipal corporation,

Petitioners,

vs.

MARGARET A. WOLFENBARGER d/b/a SHADY SAM'S PAWN SHOP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January, 1986

QUESTIONS PRESENTED

1. QUESTION: Whether a municipal police officer, a police supervisor, the Chief of Police, and a municipal corporation taking action pursuant to orders of the local district attorney and his assistant to seize and hold property alleged to be stolen and found in the possession of a pawnbroker, and again pursuant to orders from the prosecutors, return stolen property to its rightful owner would commit an action which deprives the pawnbroker of property without due process of law when the prosecutors and individual police officers and municipal defendants believe the pawnbroker has no interest in the stolen property, and where the state has in place postdeprivation remedies to consider the pawnbroker's claim.

2. QUESTION: Whether the failure of the plaintiff/respondent to allege a policy formulated and carried out by the municipal

defendant, the City of Lawton, Oklahoma, is fatally deficient so as to render any such petition inadequate to state a cause of action against that municipal defendant.

3. QUESTION: Whether the individual police officer, his supervisor, or the Chief of Police should be considered clothed with prosecutorial immunity under the circumstances of this case, or, in the alternative, whether the individual police officer, his supervisor, and the Chief of Police are clothed with a qualified immunity since their actions were undertaken pursuant to directives from the Office of the County Prosecutor, and their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

LIST OF PARTIES

Parties to the action below were Margaret A. Wolfenbarger d/b/a Shady Sam's Pawn Shop; Clancy Williams, a Lawton police officer; Loy Bean, a Lawton police captain; Robert L. Gillian, Chief of Police of the City of Lawton, Oklahoma; Dick Tannery, District Attorney of Comanche County, Oklahoma; Robert Perrine, former Assistant District Attorney of Comanche County, Oklahoma; and the City of Lawton, Oklahoma, a municipal corporation.

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In The

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OCTOBER TERM, 1985

NO. _____

CLANCY WILLIAMS, LOY BEAN ROBERT L. GILLIAN, and the **CITY OF LAWTON, OKLAHOMA,** a municipal corporation,

Petitioners,

vs.

MARGARET A. WOLFENBARGER d/b/a SHADY SAM'S PAWN SHOP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Clancy Williams and Loy Bean, police officers for the City of Lawton, Oklahoma, Robert L. Gillian, Chief of Police for the City of Lawton, Oklahoma, and the City of Lawton, Oklahoma, a municipal corporation, by and through their attorneys, David M. Curtis, City Attorney, and Assistant City Attorney Gerald S. Rakes (of counsel), pray that

a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINION BELOW

The decision in the United States Court of Appeals for the Tenth Circuit, for which this petition is sought, is reported in 774 F.2d 358 (1985). The style in the court below was Wolfenbarger d/b/a Shady Sam's Pawn Shop v. Williams, et al, Tenth Circuit Court of Appeals No. 83-2331. The opinion for which review is sought was rendered on September 26, 1985. The defendants filed a Petition for Rehearing which was denied on November 8, 1985. Co-defendants, Dick Tannery, District Attorney for Comanche County, Oklahoma, and Robert Perrine, former Assistant District Attorney of Comanche County, Oklahoma, by and through their attorney, the Attorney General of the State of Oklahoma, Michael C. Turpen, have separately filed a Petition for Writ of Certiorari herein. The text of the opinion and orders by the United States District Court for the Western District

of Oklahoma are attached hereto as Appendices A, B, and C, and the opinion of the Court of Appeals for which review is sought is attached hereto as Appendix D. The dissenting opinion of Circuit Judge Seth to the Court of Appeals opinion is separately delineated as Appendix E. A certified copy of the dismissal by plaintiff in an associated state case entitled Wolfenbarger v. Williams, No. C-80-1081, filed in the District Court of Comanche County, Oklahoma, is attached hereto as Appendix F.

JURISDICTIONAL STATEMENT

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C. § 1983 states in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

Title 22 Okla. Stat. 1981 § 1321 states in its entirety:

> "When property alleged to have been stolen or embezzled, comes into the custody of a peace oficer, he must hold it subject to the order of the magistrate authorized by the next section [§ 1322 of this title] to direct the disposal thereof. R.L.1910, § 6127."

Title 22 Okla. Stat. 1981 § 1322 states in its entirety:

> "On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand

and receive the property. R.L.1910, § 6128."

Title 51 Okla. Stat. Supp. 1978 § 153 states in its entirety:

"Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of corruption or fraud of the employee."

Title 51 Okla. Stat. Supp. 1978 § 162 states in pertinent part:

Sec. 162. Constitutional or statutory rights, privileges or immunities--violation by employee--defending--indemnification--right of recovery--punitive or exemplary damages.

"a. A political subdivision, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, shall:

"1. * * *

"2. Pay or cause to be paid any judgment entered against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against any employee; and any costs or fees, for a violation of property rights or rights, privileges or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of his employment."

Title 74 Okla. Stat. Supp. 1976 § 20(f) states in pertinent part:

> "f. Any officer or employee who acts outside the scope of his official authority shall be liable in damages in the same manner as any private citizen."

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case was originally a civil rights action filed in the United States District Court for the Western District of Oklahoma pursuant to 42 U.S.C. § 1983, in which the plaintiff asserted federal jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343(3). The issues asserted herein were first raised by the defendants below in motions for summary judgment under Rule 56 and motions to dismiss under Rule 12.b.(6). The trial court converted all motions to motions for summary judgment under Rule 56, and allowed the parties to file supplementary material. The District Court subsequently granted a motion to dismiss as to all defendants, prior to trial, and there is therefore no transcript of proceedings below. The Statement of Facts which follows has been

excerpted from the opinion of the Court of Appeals, and may, with the one exception specifically noted, be generally accepted as correct. Footnotes have been omitted.

> "Wolfenbarger owns and operates Shady Sam's Pawn Shop in Lawton, Oklahoma. On August 15, 1980, Williams entered Shady Sam's while investigating a report of stolen property. The property, a stereo receiver and cassette player, had been reported as stolen by the owner, a Mr. Logens [sic], on August 13, 1980. In the course of his investigation of the pawnshop, Williams discovered that the serial numbers listed on two pawn tickets matched the numbers of the stolen stereo equipment. Williams did not confiscate the two items at that time but instead issued the pawnshop a ticket, placing the property on 'hold'. A 'hold' was an official police request that a pawnshop not sell or otherwise dispose of items needed as evidence in a criminal investigation or prosecution. This was the Lawton police department practice in effect when Williams first discovered the property in Shady Sam's.
>
> "On October 30, 1980, District Attorney Tannery wrote a letter to Chief Gillian informing him of a change in the procedure Lawton police were to follow when they discovered suspected stolen property in pawnshops. The letter stated:
>
> 'Dear Chief Gillian:
>
> After reviewing the applicable law, I would advise the use of the

procedure used by Oklahoma and Tulsa Counties regarding stolen property recovered in pawn shops, to-wit:

1. Under the authority of 21 OS § 1092 the officer and or true owner of merchandise should inspect the pawn shops for the stolen merchandise.

2. All stolen property found should be treated as if recovered from other parties. That means that the officers should seize the property and place it on property receipt in the custody of the police department.

3. Under 22 OS § 1321 et seq. the magistrate will determine the disposition of the property.

Sincerely,

/s/ Dick Tannery
District Attorney'

"Rec., vol. I, at 89.

"Okla. Stat. tit. 21 § 1092 (1981) requires a pawnbroker to permit a police officer to inspect the premises for stolen goods during usual business hours. Okla. Stat. tit. 22 §§ 1321 et seq. (1981) provides procedures to be followed when a police officer comes into possession of property allegedly stolen. Sections 1321 and 1322 provide that a magistrate must determine the true owner of any such property before the police may release it from their custody. Coleman v. Faulkner, 697 F.2d 1347, 1348 (10th Cir. 1982).

"Gillian promulgated Tannery's letter to all members of the Lawton police department. On November 10, Williams and Bean returned to Shady

Sam's and seized the two items Williams had previously identified and placed on hold. After giving Wolfenbarger a receipt for the items, Williams placed them in the Lawton police station property vault. Acting on District Attorney Tannery's behalf, Perrine sent a memorandum on November 13 to Williams directing him to release the two items to Logens. Williams complied the next day and gave the items to Logens. Wolfenbarger was not notified of the property's release nor was there any judicial determination of the property's ownership before Perrine ordered it released.

"Immediately after Williams seized the two items, Wolfenbarger brought a replevin action against him in state court. After Williams gave the items to Logens, the court declared the replevin action moot because Williams no longer had possession. [Attached hereto and incorporated herein as Appendix F is a certified copy of the dismissal order in Wolfenbarger v. Williams, No. C-80-1081, which reflects on its face that the dismissal in the above action referred to by the Court of Appeals was at the behest of the plaintiff and was not subsequent to a judicial finding of mootness by the trial court.] Thereafter, Wolfenbarger brought this action in federal court alleging that defendants' conduct had deprived her of her right to due process under the United States Constitution. The district court held that Wolfenbarger, as a holder of stolen goods, had no constitutionally protected property right in the items and thus could not claim a due process violation. The court granted summary judgment in favor of defendants."

REASONS FOR GRANTING THE WRIT

I.

The court below decided a federal question in a manner which was in conflict with the decision of this Court in Hudson v. Palmer, 468 U.S. ____, 82 L.Ed.2d 393 (1984).

The due process issue raised herein developed when a City of Lawton police officer returned some stolen stereo equipment to its rightful owner pursuant to an order which he had received from an Assistant District Attorney acting on behalf of the District Attorney. This equipment had been previously seized in compliance with the provisions of a letter directive from the District Attorney. The prosecutors issuing the directives had reasoned that the pawnbroker had no property interest in the stereo equipment vis-a-vis the true owner from whom it had been stolen, and therefore did not deem it necessary to use the state-created statutory procedure for determining the ownership of stolen property. It is undisputed by

any of the parties that the procedure established for distribution of this stolen property was, in this case, formulated by the District Attorney and Assistant District Attorney, and that the actions of the individual police officers and police supervisors were taken pursuant to their reliance upon the directives issued by the office of the prosecuting attorneys.

If it is hypothesized that the prosecutors acted improperly in ordering the return of the stereo equipment to its rightful owner without a hearing, it is the position of the individual police officers and the municipal defendant that the due process question in this case is controlled by this Court's decision in Hudson. In that case, this Court held:

> "Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.

> "Respondent presses two arguments that require at least brief comment. First, he contends that, because an agent of the state who intends to deprive a person of his property 'can provide predeprivation process, then as a matter of due process he must do so.' Brief for Respondent 8 (emphasis in original). This argument reflects a fundamental misunderstanding of Parratt. There we held that postdeprivation procedures satisfy due process because the State cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process."

Id 468 U.S. at ____, 82 L.Ed.2d at 407-408. Footnote omitted. (Emphasis added.)

Applying this language to the position in the case at bar, when the prosecutors, rightly or wrongly, ordered the return of the stolen stereo equipment to its rightful owner without a hearing, the question is, was the State of Oklahoma in a position to provide for predeprivation process? Viewed from the perspective of the State of Oklahoma, the answer must be no. The lower court interpreted the requirements of Hudson exactly contrary to this position when they said:

"The situation in this case differs significantly from that in Parratt or Hudson. To begin with, not only is the state in a position to provide predeprivation process, it has expressly done so through the enactment of sections 1321 and 1322. Oklahoma has recognized that far from being impracticable or impossible, a hearing after the police initially take possession of property and before they release it is the most timely and efficient point at which to adjudicate property interests. Cf. Coleman v. Turpen, 697 F.2d 1341, 1344 (10th Cir. 1983). The state recognizes this point as the time at which the harm to an individual can best be minimized while also accommodating the state's interest in restricting the movement of allegedly stolen property.

"Once the police have confiscated and secured allegedly stolen property, the 'necessity for quick action by the State,' Parratt, 457 U.S. at 539, is no longer present. Defendants do not suggest, nor can we discern, any justification for an accelerated or immediate return of such property to one claiming ownership. The existence of sections 1321 and 1322 belie any suggestion that the state has or recognizes any need for such swift or expedited action, once the police have secured the property. Thus, one of the fundamental rationales of Hudson and Parratt, the need for quick action, is absent from this case. See Augustine, 740 F.2d at 327.

"The record developed prior to the summary judgment motion indicates that the additional critical elements of random and unauthorized state conduct are not present here. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court held that Parratt

> does not apply, and that post deprivation remedies do not satisfy due process, where a deprivation of property is caused by conduct pursuant to establish state procedure."

It is the position of the individual police officers and the municipal defendant that the above analysis by the Tenth Circuit Court of Appeals is a complete misinterpretation of the impact of Parratt v. Taylor, 451 U.S. 527, and Hudson v. Palmer, supra. As the Court specifically noted, Title 22 Okla. Stat. 1981 §§ 1321 and 1322 specifically provide procedural requirements to be followed in the determination of ownership of stolen property that comes into the custody of law enforcement officials. It is, in fact, the failure to follow these statutory procedures which the Tenth Circuit cites as evidence of deprivation of property right without due process.

The lower court finds that the actions of the police officers, in compliance with the orders of the prosecutors, were not random and unauthorized, because (citing Patterson v. Coughlin, 761 F.2d 866 (2d Cir., 1985)):

> "Unlike the deprivation of property that occurred in Parratt, here the responsible state officials who had

> the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest....Thus, the deprivation of liberty was neither 'random' nor 'unauthorized'."

This analysis completely ignores the earlier cited language from Hudson indicating that the perspective from which these cases must be analyzed is that of the state and its ability to provide for a predeprivation process, and not from the point of view of the state officials. The State of Oklahoma had passed and had in effect the statutes and could not, having done so, be expected to anticipate that those charged with carrying out these statutory obligations would act without complying with them.

There is no legitimate allegation in this case that the postdeprivation remedies available to the plaintiff/respondent under Oklahoma law are inadequate to provide due process. In fact, plaintiff/respondent initially took advantage of Oklahoma process by filing a replevin action in the District Court for Comanche County, Oklahoma, styled as Margaret Wolfenbarger d/b/s Shady Sam's Pawn Shop v. Clancy

Williams, C-80-1081, which case was dismissed by the plaintiff's attorney prior to a finding being rendered by the Court. (See App. F.) As was noted in the earlier Statement of the Case, the lower court misapprehended what had occurred in this state procedure and indicated that this replevin action had been declared moot by the Comanche County District Court.

The Court of Appeals relied upon Logan v. Zimmerman Brush Co., supra, for the proposition that once the state had conferred a property interest it may not authorize the deprivation of such interest without procedural safeguards that comport with the standards of federal due process. (App. D, at 14.) As was earlier noted, the point is that the State of Oklahoma did not authorize the return of the stereo equipment without a hearing, but, in fact, created a process which required a hearing.

It is the position of these petitioners that the analysis of the case at bar by the lower court might have some validity were that analysis taken from the point of view of a common law tort suit. However, when analyzed from

the point of view of the applicability of the fact situation to a Title 42 U.S.C. § 1983 action for deprivation of civil rights without due process of law, it fails to adequately address the state action requirement necessary for a finding of liability under that section.

When the facts of this case are analyzed from the viewpoint expressed by this Court in Hudson, certain facts become clear. As early as 1910, the State of Oklahoma, had established procedures to be followed when property alleged to be stolen or embezzled came into the custody of a peace officer. These laws had been carried over and recodified as Title 22 Okla. Stat. 1981 §§ 1321 and 1322. The District Attorney, by his letter of November 10, 1980, indicated his awareness of and intent to comply with these laws and communicated this position to Chief Robert L. Gillian. Gillian further disseminated Tannery's letter to the individual police officers, Williams and Bean, directly responsible for location and seizure of property in the custody of pawnbrokers which was alleged to be stolen.

The police officers in question then seized the property. Up to that point, there has been no deprivation of any property right secured by the laws or Constitutions of the United States or the State of Oklahoma, without due process. There then follows an order from Tannery's office signed by Assistant District Attorney Perrine directing the disbursal of the property in question. This order is directed to the individual police officers, and, from their point of view, it appears regular on its face. They then take action in compliance with it. Viewed from the perspective of the municipality and the Chief of Police, the only policy-making member of the municipality cited in this suit, the only information received from the prosecutor's office indicates that, prior to distribution of the property, there will be a hearing in compliance with the cited statutes.

Viewed from the perspective of the two individual police officers, they would be reasonably expected to rely upon the prosecutor's office to take action to provide a hearing prior to distribution of the property, and it

cannot be legitimately contended that either of these police officers would have had the ability or the opportunity to provide a hearing for any of the parties prior to distribution. Such action would be the sole responsibility of the prosecutor's office. Assuming hypothetically that the actions of the prosecutor in failing to provide for such statutory mandated hearing was error, that error was clearly random and unauthorized from the point of view of the State of Oklahoma.

A secondary question, when the facts of this case are viewed from the point of view of the municipal defendant, City of Lawton, Oklahoma, is whether the failure of plaintiff/respondent to allege a policy on the part of the defendant municipality is so fatally deficient as to render such petition inadequate to state a cause of action against the municipal defendant.

It is undisputed that the policy regarding disposition of stolen property executed in this case was formulated by the district attorney's office, and the execution of that policy was

carried out by individual police officer Clancy Williams and his supervisor, Capt. Loy Bean. The policy in question was formulated on November 10, 1980, and it should also be noted that the policy was regular on its face, due to its reference in paragraph 3 of the letter of District Attorney Tannery to the requirement for a magistrate's determination of ownership of stolen property under 22 Okla. Stat. 1981 §§ 1321 and 1322. The facts of the case clearly indicate that the only supervisory personnel who could truly be said to establish municipal policy would be Chief Robert L. Gillian, and the facts are equally undisputed that Chief Gillian only was made aware of the letter of District Attorney Tannery of November 10, 1980. The subsequent directive from Assistant District Attorney Robert Perrine, ordering the release of the seized, stolen property to its rightful owner gives no indication that it was ever brought to the attention of any municipal policy maker; and, in fact, such is not even alleged by this plaintiff/respondent. It is only alleged that the City of Lawton and its

chief of police, Robert L. Gillian, permitted and continue to permit, this policy established by District Attorney Dick Tannery of the confiscation of private property without judicial warrant. Even the Tenth Circuit's decision found no constitutional deficiency with the pretrial evidentiary seizure of stolen merchandise found in the custody of the pawnbroker without a warrant. Its finding of deficiency lay in the distribution of that merchandise to the rightful owner without a hearing in compliance with Title 22 Okla. Stat. 1981 §§ 1321 and 1322.

A third salient issue upon this case should be reversed concerns immunities. Under Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), a prosecutor has immunity from those seeking to recover damages under 42 U.S.C. § 1983 for acts performed as part of his official functions, when those functions were within the scope of his duties in initiating and pursuing a criminal prosecution and in

presenting the state's case. It is the position of these defendants that, when acting pursuant to orders which are regular on their face, directing the individual police officer to seize stolen property located by him in the custody of a pawn shop owner, and to hold that property until its distribution is ordered subsequent to a hearing before a magistrate, and the supervisor and chief of police of such officer should equally be clothed with such prosecutorial immunity. (See Timson v. Wright, 532 F.2d 552 (6th Cir., 1976; and Denham v. Leedy, 479 F.2d 1097 (6th Cir., 1973.)

In the alternative, should this Court find that the individual police officer, his supervisor, and the Chief of Police are not entitled to the absolute immunity available to the prosecutor, in accordance with Imbler, supra, these petitioners would contend that they are entitled to qualified immunity in accordance with the standard set out in Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727, wherein it was determined that governmental officials performing discretionary functions

should generally be shielded from liability for civil damages insofar as their conduct does not violate clearly established, statutory or constitutional rights of which a reasonable person would have known. Applying that analysis to the fact circumstances at bar, as was previously indicated, the only contact which Chief of Police Robert L. Gillian had witn this case was the receipt of the letter from District Attorney Tannery on November 10, 1980, wherein it was alleged that, prior to distribution of any such property seized, a hearing would be held before a magistrate in accordance with Oklahoma law. The individual police officer and his supervisor were also made aware of Tannery's letter of November 10th. They subsequently received a directive ordering the release of the property, signed by Assistant District Attorney Robert Perrine. Since, to their knowledge, the District Attorney and, by inference, his assistant were aware of the existence of a requirement for a hearing prior to the distribution of the property in accordance with Oklahoma law, the police officers had the

right to rely upon the good offices of the prosecutors to have carried out the requirement, and therefore their actions in response to such directives should entitle them to a qualified immunity for liability for civil damages. This is especially true since the requirements were that this property be returned to the rightful owner who had originally reported it stolen. A reasonable person would clearly believe that property being held by the police department, pursuant to orders from the District Attorney, should be distributed to the rightful owner and not to a pawnbroker who had taken the property in pledge and who would have no property interest, as against the rightful owner.

II.

The decision of the Court below is in conflict with decisions reached on similar issues from other courts of appeal.

As well as being in conflict with the Court's opinion in Hudson v. Palmer, supra, the decision rendered by the lower court directly conflicts with decisions on similar issues from

other courts of appeal. In Wilkins v. Whitaker, 714 F.2d 4, 6 (4th Cir., 1983), the Fourth Circuit averred:

> "We have construed Parratt to include the intentional destruction of a prisoner's property by a random, unauthorized act....Whether Detective Whitaker deprived Wilkins of his property intentionally, as Wilkins alleges, or negligently, as the district court concluded, Palmer and Parratt control the outcome of this case for Whitaker's action was a random, unauthorized action with which Parratt and Palmer dealt. In either case, a post-deprivation remedy satisfied due process."

This rationale was applied to the removal of property from a criminal defendant's car and its later release to that criminal defendant's sister and a relative of his wife. The Fourth Circuit also relied on a similar rationale in Daniels v. Williams, 720 F.2d 792 (4th Cir., 1983), which case alleged negligent deprivation of a liberty interest by an inmate when he slipped and fell on a pillow left on the stairs by a deputy.

The Court of Appeals of the Fifth Circuit, in Collins v. King, 743 F.2d 248, at 254 (5th Cir., 1984), said:

> "...it is plain that Hudson, supra, governs and that under the Hudson rule

> it is not sufficient to state a claim. Collins does not assert that it was part of state procedure to constitute tribunals such as his in such a manner. Indeed, his allegations that a biased, high-ranking prison officer simply took it upon himself to sit in Collins' case only and to punish him on the basis of an earlier, extraneous event present just such an instance of random and unpredictable action by a state employee in violation of established procedure as is envisioned by both Parratt and Hudson. Nor did Collins allege that Louisiana procedures for redress of the improper administrative proceeding in his case were constitutionally inadequate. It follows that, by the teachings of Parratt and Hudson, he did not allege a violation of the Due Process Clause of the Fourteenth Amendment and his action was properly dismissed."

This case arose out of an alleged deprivation of a liberty interest as a result of an administrative proceeding which was improperly constituted. This rationale was also followed in the Fifth Circuit in Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir., 1984).

The Sixth Circuit Court of Appeals has followed a similar analysis in Wagner v. Higgins, 754 F.2d 186 (6th Cir., 1984); and Vicory v. Walton, 721 F.2d 1062 (6th Cir., 1983). Of those two cases, Vicory is particularly relevant to the case at bar, since it dealt with

the deprivation of a property interest and alleged a lack of due process of law.

For further case analysis in other jurisdictions, the Court's attention is commended to Wolfe-Lillie v. Sonquist, 699 F.2d 864 (7th Cir., 1983); and Ellis v. Hamilton, 669 F.2d 510, (7th Cir., 1982); as well as White v. Clark, 750 F.2d 721 (8th Cir., 1984); and Hubenthal v. County of Winona, 751 F.2d 243 (8th Cir., 1984).

CONCLUSION

An examination of the cited cases will quickly reveal that the findings in each of these other circuits directly conflict with the findings of the Tenth Circuit Court of Appeals in its ruling on the case at bar. It is the position of these petitioners that the more sound analysis of the impact of Hudson and Parratt upon these Section 1983 actions is to be found in the cases cited from the other Circuits. We therefore respectfully ask that this case grant the Writ for Certiorari and review the decision of the court below. That erroneous decision has rendered liable public

servants across the length and breadth of that Circuit to judgments for deprivation of civil rights under fact circumstances which can clearly best be handled as a common law tort claim in a state-level action. Additionally, continued recognition of these common law tort claims as 1983 actions has the adverse impact of opening the public coffers to private attorneys for the recovery of their attorneys fees. Finally, elimination of this source of Section 1983 litigation will greatly ease the burden on an already over-crowded federal docket. With these ends in mind, it is respectfully requested that this Court grant the Writ of Certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

DAVID M. CURTIS
City Attorney for
Lawton, Oklahoma

GERALD S. RAKES
Assistant City Attorney
of counsel

APPENDICES

APPENDIX A: ORDER BELOW

[Order granting summary judgment for defendants entered by the United States District Court for the Western District of Oklahoma on September 20, 1983]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MARGARET A. WOLFENBARGER d/b/a Shady Sam's Pawn Shop Plaintiff, vs. CLANCY WILLIAMS, LOY BEAN, ROBERT GILLIAN, DICK TANNERY, ROBERT PERRINE and THE CITY OF LAWTON, OKLAHOMA, a municipal corporation, Defendants.	)	CIV-82-1945-W

O R D E R

The defendants, the City of Lawton, Clancy Williams, Loy Bean, and Robert L. Gillian, moved the Court pursuant to Rule 12(b)(6), F.R.Civ.P., to dismiss the complaint of the plaintiff, Margaret A. Wolfenbarger d/b/a Shady Sam's Pawn Shop, for failure to state a claim upon which relief could be granted. The defendants submitted a brief and an exhibit in

support of their motion and the plaintiff responded by brief and exhibits. As the parties presented material outside the pleadings for the Court's consideration with regard to several issues, the motion to dismiss, after timely notice to the parties, was converted to a motion for summary judgment. The three individual defendants also moved the Court prior to the conversion of the motion to dismiss for summary judgment on one issue also raised in the motion to dismiss. All supplemental materials have been received and examined and upon consideration of the submissions of the parties and of the standards by which summary judgments are governed, the Court makes the following determination with regard to the issue which is dispositive of this action.

The plaintiff, who is a licensed pawnbroker in the state of Oklahoma, has complained that on November 10, 1980, defendant Williams, a police officer of the City of Lawton, under the direction of defendant Bean, also a police officer of the City of Lawton, entered the plaintiff's place and seized a

Marantz receiver and a Sony cassette deck; that the seizure was under the direction of co-defendants, Dick Tannery, the District Attorney for Comanche County, Oklahoma, and Robert Perrine, Assistant District Attorney; that the plaintiff sought relief in the District Court of Comanche County, Oklahoma, but was unable to recover the property since defendant Williams, at the direction of defendant Perrine, gave the property to a third party; that co-defendants, the City of Lawton and Gillian, Chief of Police of Lawton, permitted and continue to permit this policy established by District Attorney Tannery of confiscation of private property without judicial warrant; and that the actions of these defendants caused the plaintiff's property to be taken in violation of 42 U.S.C. § 1983.

The policy of which the plaintiff complains is embodied in a letter sent to defendant Gillian as Chief of Police by defendant Tanner [sic] in his capacity as District Attorney. The letter reads in pertinent part:

> "After reviewing the applicable law, I would advise the use of the procedure used by Oklahoma and Tulsa Counties

regarding stolen property recovered in pawn shops, to-wit:

1. Under the authority of 21 O.S.§ 1092 the officer and or true owner of merchandise should inspect the pawn shops for the stolen merchandise.

2. All stolen property found should be treated as if recovered from other parties. That means that the officers should seize the property and place it on property receipt in the custody of the police department.

3. Under 22 O.S. § 1321 et seq. the magistrate will determine the disposition of property."

The defendants, whose arguments are based on the fact that the property seized from the plaintiff was stolen and returned to its true owner, have contended that the complaint should be dismissed for three reasons: (1) it fails to allege the plaintiff's property interest in the confiscated property; (2) it fails to allege a policy adopted by the defendant municipality; and (3) it fails to allege a deprivation of due process since there was a state remedy available to the plaintiff. The defendants have also argued that the Court should abstain in this proceeding pending completion by the Oklahoma Supreme Court of a

similar case, an argument which is now moot, and that the defendant officers as agents of the prosecutor are cloaked with prosecutorial immunity. As the Court finds the argument regarding the plaintiff's property interest dispositive of this action, the remaining arguments advanced by the defendants will not be addressed.

The Court agrees with the defendants in their contention that unless the plaintiff has a property interest in the items seized by the officers she cannot claim a violation of her constitutional right of due process and it is her failure to do so which requires the Court to dismiss this action.

The authority advanced by the defendants indicates that legal title remains in the pledgor of the property and possession only passes to the pledgee/pawnshop owner who has a special property interest in the item pledged until the obligation secured by the pledged property is satisfied, 72 C.J.S. Pledges § (1951) [sic]; e.g., Miller v. Horton, 69 Okla.

147, 170 P. 509 (1918) (on a pawn of personalty, general ownership remains with pledgor and only a special property passes to tne pledgee), and it is this special property interest that the plaintiff has asserted as her protected property right in the items seized. The authority indicates further that pawnbrokers can acquire more than just a special property interest if a default in the pledge occurs. 72 C.J.S. Pledges § 2 (1951).

The Court recognizes that questions of fact do exist which would render summary judgment inappropriate under the federal rules under different circumstances--such questions being whether a default in the pledge had occurred or whether title remained in the pledgor with possession only passing to the plaintiff as pledgee.

These potential questions of fact however overlook the most critical factual finding in this case and that is the undisputed fact that the property seized by the defendant officers was stolen and returned to the true owner, Louie E. Loggens, who had reported the items

stolen on August 13, 1980. Co-defendant Tannery learned that the items were in the plaintiff's possession as a result of her compliance with the City of Lawton Code, Section 7-147 and 7-148, which require pawnbrokers to disclose lists of pawned property and upon such information, he initiated the seizure of the property by the officers.

In order to plead a prima facie claim of civil rights deprivation under section 1983, the plaintiff must allege some conduct of the defendants depriving her of a right secured by the Constitution and the laws of the United States, and a plaintiff has a cause of action under 1983 if she is deprived of property through state action without due process of law.

No one has denied that the instant plaintiff was deprived of property. It is the fact that the plaintiff's rights in the property are inferior to the rights of the true owner in the property that defeats her cause of action. The plaintiff can acquire no better right in or title to the property than that of the pledgor

thief and it is for this reason that the plaintiff has failed to allege a protected property right. E.g., Al's Auto Sales v. Moskowitz, 203 Okla. 611, 224 P.2d 588 (1950); Adkisson v. Waitman, 202 Okla. 309, 213 P.2d 465 (1950); see 72 C.J.S. Pledges § 26(b). See also 12A O.S. 2-403(1) (buyer cannot acquire greater title than seller). The Court does not interpret section 1983 or the Constitution to permit the recovery of damages for seized property to a person whose right therein is in derogation of the rights of the trueowner [sic].

Where no genuine disputed material factual issues exist as to a plaintiff's claim for relief, summary judgment is appropriate under the federal rules. Rule 56, F.R.Civ.P. As the Court has found that it is uncontrovered [sic] that the property seized by the defendant officers was stolen and returned to the true owner, and the plaintiff had no recognized and protected property interest in the property seized as determined by state law under these circumstances, the Court finds further that the plaintiff cannot support a claim of civil

rights deprivation by seizure of property without due process.

Accordingly, the Court finds that the converted Motion to Dismiss of defendants Williams, Bean and Gillian and the defendant municipality is GRANTED. This finding renders MOOT the Motion for Summary Judgment of defendants Williams, Bean and Gillian.

IT IS SO ORDERED this 20th day of September, 1983.

/s/ Lee R. West
LEE R. WEST
United States District Judge

Entered in judgment docket on 9-20-83.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma

Dated: September 20, 1983

Margaret A. Wolfenbarger d/b/a Shady Sam's Pawn Shop, Plaintiff,	)	
vs.	)	Case No. CIV-82-1945-W
Clancy Williams et al., Defendants.	)	

To Herbert T. Hope, Clerk:

Please enter the folowing minute order in the above entitled case.

In an Order previously entered in this matter, the Court dismissed the plaintiff's action against defendants Clancy Williams, Loy Bean, Robert L. Gillian, and the City of Lawton. The factual findings and legal conclusions rendered by the Court in that decision are dispositive of the motions urged by defendant Dick Tannery in this action and thus, the Court finds based upon the same that the Motion to Dismiss and the Motion for Summary Judgment are GRANTED.

/s/ Lee R. West
UNITED STATES DISTRICT JUDGE

Counsel Notified

Entered in Judgment Docket on 9-20-83.

Clerk to Notify

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma

Dated: September 20, 1983

Margaret A. Wolfenbarger d/b/a Shady Sam's Pawn Shop, Plaintiff,	)	
vs.	)	Case No. CIV-82-1945-W
Clancy Williams et al., Defendants.	)	

To Herbert T. Hope, Clerk:

Please enter the folowing minute order in the above entitled case.

In an Order previously entered in this matter, the Court dismissed the plaintiff's action against defendants Clancy Williams, Loy Bean, Robert L. Gillian, and the City of Lawton. The factual findings and legal conclusions rendered by the Court in that decision are dispositive of the Motion to Dismiss urged by co-defendant Robert Perrine in this matter and thus, the Court finds based on the same that the Motion to Dismiss is GRANTED. Such a finding renders MOOT defendant Perrine's Motion for More Definite Statement.

/s/ Lee R. West
UNITED STATES DISTRICT JUDGE

Counsel Notified

Entered in Judgment Docket on 9-20-83.

Clerk to Notify

APPENDIX D: OPINION BELOW

[Slip Opinion reversing the decision of the United States District Court for the Western District of Oklahoma which had previously granted Summary Judgment for defendants.)

filed September 26, 1985, and reported in 774 F.2d, 358 (1985).

[**Note:** footnotes are set out as endnotes and follow the text of the opinion]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Margaret A. Wolfenbarger d/b/a Shady Sam's Pawn Shop, Plaintiff-Appellant,	)	
vs.	)	No. 83-2331
Clancy Williams et al., Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 82-1945-W)

Submitted on the briefs:

Warren H. Crane, Lawton, Oklahoma, for Plaintiff-Appellant.

Gerald S. Rakes, Assistant City Attorney, City of Lawton, Oklahoma, for Defendants-Appellees Clancy Williams, Loy Bean, Robert Gillian and the City of Lawton, Oklahoma.

Michael C. Turpen, Attorney General, and Robert A. Nance, Assistant Attorney General,

State of Oklahoma, for Defendant-Appellee Robert Perrine.

Seymour, Brietenstein, and Seth, Circuit Judges.

SEYMOUR, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Margaret Wolfenbarger brought this action under 42 U.S.C. § 1983 (1982) against the City of Lawton, City police officers Clancy Williams and Loy Bean, Chief of Police Robert Gillian, Comanche County District Attorney Dick Tannery, and Comanche County Assistant District Attorney Robert Perrine. Wolfenbarger, a licensed Oklahoma pawnbroker, alleges that defendants violated her constitutional right to due process when they seized certain property from her pawnshop and turned it over to a third party. The district court held that Wolfenbarger did

not have a protected property interest in the items, and granted summary judgment in favor of defendants. We reverse.

I.

BACKGROUND

Wolfenbarger owns and operates Shady Sam's Pawn Shop in Lawton, Oklahoma. On August 15, 1980, Williams entered Shady Sam's while investigating a report of stolen property. The property, a stereo receiver and cassette player, had been reported as stolen[1] by the owner, a Mr. Logens (sic), on August 13, 1980. In the course of his investigation of the pawnshop, Williams discovered that the serial numbers listed on two pawn tickets matched the numbers of the stolen stereo equipment. Williams did not confiscate the two items at that time but instead issued the pawnshop a ticket, placing the property on "hold". A "hold" was an official police request that a pawnshop not sell or otherwise dispose of items needed as evidence in a criminal investigation or prosecution. This was the Lawton police department practice

in effect when Williams first discovered the property in Shady Sam's.

On October 30, 1980, District Attorney Tannery wrote a letter to Chief Gillian informing him of a change in the procedure Lawton police were to follow when they discovered suspected stolen property in pawnshops. The letter stated:

"Dear Chief Gillian:

After reviewing the applicable law, I would advise the use of the procedure used by Oklahoma and Tulsa Counties regarding stolen property recovered in pawn shops, to-wit:

1. Under the authority of 21 OS § 1092 the officer and or true owner of merchandise should inspect the pawn shops for the stolen merchandise.

2. All stolen property found should be treated as if recovered from other parties. That means that the officers should seize the property and place it on property receipt in the custody of the police department.

3. Under 22 OS § 1321 et seq. the magistrate will determine the disposition of the property.

Sincerely,

/s/ Dick Tannery
District Attorney"

Rec., vol. I, at 89.[2]

Okla. Stat. tit. 21 § 1092 (1981) requires a pawnbroker to permit a police officer to inspect the premises for stolen goods during usual business hours.[3] Okla. Stat. tit. 22 §§ 1321 et seq. (1981) provides procedures to be followed when a police officer comes into possession of property allegedly stolen. Sections 1321 and 1322 provide that a magistrate must determine the true owner of any such property before the police may release it from their custody.[4] Coleman v. Faulkner, 697 F.2d 1347, 1348 (10th Cir. 1982).

Gillian promulgated Tannery's letter to all members of the Lawton police department. On November 10, Williams and Bean returned to Shady Sam's and seized the two items Williams had previously identified and placed on hold. After giving Wolfenbarger a receipt for the items, Williams placed them in the Lawton police station property vault. Acting on District Attorney Tannery's behalf, Perrine sent a memorandum on November 13 to Williams directing him to release the two items to Logens.

Williams complied the next day and gave the items to Logens.[5] Wolfenbarger was not notified of the property's release nor was there any judicial determination of the property's ownership before Perrine ordered it released.

Immediately after Williams seized the two items, Wolfenbarger brought a replevin action against him in state court. After Williams gave the items to Logens, the court declared the replevin action moot because Williams no longer had possession. Thereafter, Wolfenbarger brought this action in federal court alleging that defendants' conduct had deprived her of her right to due process under the United States Constitution. The district court held that Wolfenbarger, as a holder of stolen goods, had no constitutionally protected property right in the items and thus could not claim a due process violation. The court granted summary judgment in favor of defendants.

II.

PROPERTY INTEREST

In evaluating Wolfenbarger's due process claim we look to Oklahoma law to determine the nature and extent, if any, of her property interest in the stereo items.[6] See Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A pawnbroker, as the pledgee of pledged property, does not hold title to the property under Oklahoma law. Miller v. Horton, 69 Okla. 147, 170 P. 509, 511 (1917). Legal title remains in the pledgor and possession only passes to the pawnbroker, who has a special property interest in the item pledged until the obligation secured by the pledged property is satisfied. Id. The district court concluded, and defendants argue on appeal, that because Wolfenbarger had no title to the stereo items and could not prevail in a suit against the true owner, she therefore had no constitutionally protected property rights. We disagree.

It is true that under Oklahoma law, no one can confer a better title than he has. Wolfe

v. Faulkner, 628 P.2d 700, 702 (Okla. 1981); Al's Auto Sales v. Moskowitz, [sic] 203 Okla. 611, 224 P.2d 588, 591 (1950); see also Okla. Stat. tit. 12A, § 2-403(1) (1981) (buyer of goods cannot acquire greater title than seller). Since the true owner of the property cannot be divested of his ownership by a thief without his consent, even an honest pawnbroker cannot hold stolen property as against the true owner. Adkisson v. Waitman, 202 Okla. 309, 213 P.2d 465, 466 (1949). However, Wolfenbarger's lack of title is irrelevant to the existence of her rights in the property as against defendants. Under Oklahoma law, one who possesses property without having title to it nonetheless has a recognized property interest.

First, a pawnbroker's special property interest will support an action for replevin. See Williams v. Williams, 274 P.2d 359, 362 (Okla. 1954); cf. Riesinger's Jewelers, Inc. v. Robertson, 582 P.2d 409, 411 (Okla. App. 1978). In such an action the question of ownership and the right to possession is for the trier of fact. Henderson v. Lacy, 347 P.2d 1020, 1021

(Okla. 1959). In addition, possession is prima facie proof of ownership. Al's Auto Sales, 224 P.2d at 591. Because there had been no judicial determination of either the property's ownership or the right to possess it, Wolfenbarger's possession was prima facie proof that she was entitled to retain the stereo equipment at the time defendants confiscated and turned it over to Logens.

More importantly, the Oklahoma Supreme Court has held that even one who acquires stolen property from a thief has a lawful and enforceable property interest in such property. In Snethen v. Oklahoma State Union of the Farmers Educational & Cooperative Union, 664 P.2d 377 (Okla. 1983), the court was faced with deciding the property rights of a good-faith purchaser of stolen property. While acknowledging that a purchaser under defective title could not hold against the true owner, the court noted that the purchase has a "qualified possessory interest" and has "lawful possession against all the rest of the world." Id. at 381. The court distinguished between

"legal" and "lawful" property interests, and stated:

> "A legal interest is enforceable against the whole world. A good-faith purchaser for value acquires an interest that is lawful and enforceable against all the world but the legal owner. Although it is only a qualified possessory interest, it is lawful and enforceable to a very large extent."

Id. (emphasis added).

Although the ultimate issue in Snethen was whether one could have an insurable interest in stolen property, its reasoning and holding also apply to this case and refute the argument that Wolfenbarger had no legally protected property interest in the stereo equipment. The record does not indicate, nor do defendants allege, that Wolfenbarger was anything but an innocent pawnbroker who gave value for a pledge of stolen property. Like a good-faith purchaser for value, an innocent pledgee's lack of title does not defeat the lawfulness of her possession nor does it diminish her rights against the rest of the world, including defendants in this case.

Finally, the relevant Oklahoma statute itself demonstrates that the holder of stolen

property has some protected interest, because the state has provided for a judicial determination of ownership or possession prior to the return or release of seized property. See Okla. Stat. tit. 22 §§ 1321, 1322. It is defendants' bypassing of this required procedure that Wolfenbarger claims offends due process.

The district court reasoned that it did "not interpret section 1983 or the Constitution to permit the recovery of damages for seized property to a person whose right therein is in derogation of the rights of the true owner." Rec., vol. I, at 99. This conclusion erroneously assumes that the existence of a property interest depends only on one's ability to recover damages for the actual value of the items seized.

Wolfenbarger does not claim that her right to own the property was violated but rather, that her right to due process was violated. Although she may not recover the actual value of the items once she assumed the business risk of erroneously dealing with a thief, she may recover other damages for the violation of her

right to due process. She may be entitled to nominal damages, see Carey v. Piphus, 435 U.S. 247, 266-67 (1978), punitive damages against some of the defendants, see Smith v. Wade, 103 S.Ct. 1625 (1983); Lavicky v. Burnett, 758 F.2d 468, 477 (10th Cir. 1985), or injunctive or declaratory relief. The fact that she does not have all the remedies available to a true owner with legal title is therefore irrelevant to the threshold issue of whether she has some constitutionally protected property interest.

Accordingly, we hold that Wolfenbarger had a constitutionally protected property interest in the stereo items sufficient to support a claim of violation of due process. The district court erred in holding to the contrary.

III.

DUE PROCESS

Defendants claim that even if Wolfenbarger had a protected property interest, their actions did not violate due process because Oklahoma provides adequate post-deprivation remedies. They rely on the Supreme Court's decisions in Hudson v. Palmer, 104 S.CT. 3194

(1984), and Parratt v. Taylor, 451 U.S. 527 (1981). For the reasons set forth below, we believe neither of these decisions support the grant of summary judgment in this case.[7]

In Parratt, a state prisoner sued prison officials under section 1983 alleging that their negligent loss of a hobby kit violated his right to due process under the Fourteenth Amendment. The Supreme Court held that no due process violation occurs when a state employee negligently deprives an individual of property, so long as the state provides an adequate post-deprivation remedy. The Court recognized that

> "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking...satisf[ies] the requirements of procedural due process."

Parratt, 451 U.S. at 539. The Court noted that where a loss of property is caused by the random, unauthorized act of a state employee, the state cannot predict when the loss will occur. Id. at 541. As the Court observed,

> "[i]t is difficult to conceive of how the State could provide a meaningful

> hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation."

Id.

In Hudson, the Court reaffirmed and extended the reasoning of Parratt to an unauthorized and intentional deprivation of property by a state employee. See 104 S.Ct. at 3203-04. In holding that such a deprivation does not violate due process, the Court explained:

> "The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process if concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct."

Id. at 3203. In rejecting the contention that one who intentionally deprives another of property can provide predeprivation process and

therefore must do so, the Court in Hudson emphasized that "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." Id. at 3204. In this connection, the Fifth Circuit recently noted:

> "Parratt posits a distinction between (1) the random and unauthorized (and hence unpredictable) conduct of a state actor, and (2) conduct that the state can contain and direct by institutional safeguards. If the state cannot protect the individual by imposing predeprivation procedures, or if quick action is essential, the best the state can do is to allow injured individuals to recover damages after the injury has occurred."

Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) (citations omitted).

The situation in this case differs significantly from that in Parratt or Hudson. To begin with, not only is the state in a position to provide predeprivation process, it has expressly done so through the enactment of sections 1321 and 1322. Oklahoma has recognized that far from being impracticable or impossible, a hearing after the police initially take possession of property and before they release it is the most timely and efficient

point at which to adjudicate property interests. Cf. Coleman v. Turpen, 697 F.2d 1341, 1344 (10th Cir. 1983). The state recognizes this point as the time at which the harm to an individual can best be minimized while also accommodating the state's interest in restricting the movement of allegedly stolen property.

Once the police have confiscated and secured allegedly stolen property, the "necessity for quick action by the State," Parratt, 457 U.S. at 539, is no longer present. Defendants do not suggest, nor can we discern, any justification for an accelerated or immediate return of such property to one claiming ownership. The existence of sections 1321 and 1322 belie any suggestion that the state has or recognizes any need for such swift or expedited action, once the police have secured the property. Thus, one of the fundamental rationales of Hudson and Parratt, the need for quick action, is absent from this case. See Augustine, 740 F.2d at 327.

The record developed prior to the summary judgment motion indicates that the additional

critical elements of random and unauthorized state conduct are not present here. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court held that Parratt does not apply, and that post deprivation remedies do not satisfy due process, where a deprivation of property is caused by conduct pursuant to establish state procedure. See Id. at 435-37; see also Hudson, 104 S.Ct. at 3204. This distinction between random, unauthorized conduct and conduct pursuant to established state procedure is significant. See, e.g., Augustine, 740 F.2d at 327-29. As the Court noted in Logan, once the state has conferred a property interest, it may not authorize the deprivation of such an interest without procedural safeguards that comport with the standards of federal due process. See 455 U.S. at 432.

In Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985), the Second Circuit recognized that "established state procedure" involves more than the mere promulgation of procedures. There the court addressed an argument that Parratt and Hudson required dismissal of a section

1983 action against prison officials who, contrary to state law, refused to accord petitioner due process before ordering him to disciplinary confinement with loss of good time credits. The district court had dismissed the claim, stating: 'Because the procedures existed, but were allegedly not followed, no meaningful predeprivation hearing was possible." Id. at 889-90. The appellate court rejected this contention.

> "Allegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes. See, e.g., Monroe, supra, 365 U.S. at 172; Home Tel. & Tel. Co., supra, 227 U.S. at 278, 282-85; Mansell v. Saunders, 372 F.2d 573, 576 (5th Cir. 1967). The requirements of the due process clauses are directed specifically to the federal and state governments. They require the promulgation of laws and regulations providing for regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must conform to due process; otherwise the due process clause, with its guarantees of regular and predictable procedures, becomes a cipher. It is beyond cavil that due process requires more than the mere promulgation

> of laws and regulations which, if followed, would preserve the most fundamental of rights."

Id. at 891 (footnote omitted) (emphasis added).

The court concluded:

> "Unlike the deprivation of property that occurred in Parratt, here the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest. . . . Thus, the deprivation of liberty was neither 'random' nor 'unauthorized.'

Id. at 892 (emphasis added).

In Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985), we recently considered a similar situation. In that case, Oklahoma sheriffs and deputy sheriffs seized a larceny defendant's pickup truck for use as evidence at the defendant's trial. Although the defendant was convicted, no part of the truck was introduced as evidence at trial and the defendant's attorney subsequently requested the truck's return from the prosecuting assistant district attorney. The prosecutor refused to return the truck until a third party had been allowed to remove a number of the truck's parts which he claimed

the defendant had stolen from him. The prosecutor directed the sheriffs to turn over the parts, even though there had been no hearing as required by Okla. Stat. Ann. tit. 22, §§ 1321, 1322. We held that the sheriffs and prosecutor had violated the defendant's procedural due process rights and that Parratt and Hudson did not bar his claim. We reasoned that "[t]hese actions constitute an intentional deprivation that may not be characterized as random. . . . This action, planned and authorized, is not the sort of action for which postdeprivation process will suffice." Lavicky, 758 F.2d at 473 (citing Logan, 455 U.S. at 436-37). See also Garcia v. Salt Lake County, ____ F.2d ____, No. 82-1505 (10th Cir. July 17, 1985) (county liable where jail personnel established unconstitutional jail customs contrary to written policy); cf. Gregory v. Town of Pittsfield, 53 U.S.L.W. 3616, 3617 (O'Conner, J., with whom Brennan, J., and Marshall, J., join dissenting from denial of certiorari) (questioning whether Parratt suggests that so long as state makes

remedy available, contrary municipal policy comports with constitution).

We believe the reasoning and holding of Lavicky apply to this case. The record developed thus far indicates that the seizure and subsequent disposition of the stereo equipment were planned and authorized. District Attorney Tannery's letter to Chief Gillian reflects a conscious decision to alter the department-wide policy concerning allegedly stolen property and it is undisputed that Williams, Bean, and Gillian acted in direct response to this policy and the orders initiated by Tannery. Ten days after Tannery's letter to Gillian, Williams and Bean seized the stereo equipment, relying on this directive. It is also undisputed that Williams returned the property to Logens only after direct written authorization from Assistant District Attorney Perrine, acting on Tannery's behalf. In fact, the record indicates that on another occasion defendants followed an almost identical course of conduct with other property belonging to Wolfenbarger.

The conduct of which Wolfenbarger complains is the direct result of a directive issued by the district attorney, who under Oklahoma law shares with the county sheriff responsibility for law enforcement in the county. See Okla. Stat. tit. 19 § 215.5 (1981); Op. Okla. Att'y Gen. No. 79-98 (1979). As a result of his position as an enforcement executive, law enforcement agents are guided by the district attorney's interpretations and policies. His decisions thus take on a force and effect that can lead to widespread abuse of official power. As we recently noted in Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 (10th Cir. 1985), it is precisely the abuse of official power that 42 U.S.C. § 1983 was designed to remedy. We conclude that official acts initiated and controlled by a district attorney cannot be characterized as random or unauthorized. Accordingly, Parratt and Hudson do not apply to Wolfenbarger's due process claim.

The judgment of the district court is reversed and the cause is remanded for proceedings consistent with this opinion.

ENDNOTES TO APPENDIX D

[1]The record indicates that the property was apparently stolen and pawned by an unknown third party. Although the Lawton police conducted an investigation, no one was ever identified or charged in the theft.

[2]A copy of this letter was also distributed to all pawnshop owners listed in the yellow pages of the Lawton telephone book.

[3]Section 1092 provides:

> "Every pawnbroker or person carrying on the business of a pawnbroker, and every junk dealer, who having received any goods which have been embezzled or stolen, refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, or any peace officer, is guilty of a felony."

[4]Sections 1321 and 1322 provide:

> "§ 1321. Stolen property to be held by officer.
>
> When property alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by [section 1322] to direct the disposal thereof.
>
> "§ 1322. Stolen property -- Magistrate to order delivery, when.
>
> On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner on his paying the reasonable and necessary expenses incurred in its preservation,

to be certified by the magistrate. The order entitles the owner to demand and receive the property."

[5]It is undisputed that the two stereo items were stolen from Logens or that he was the true owner.

[6]We are aware of no Oklahoma authority on the question whether a pawnbroker's interest in stolen property is one protected by the due process clause. The record contains an unpublished Oklahoma Court of appeals decision purportedly addressing this question. Under Oklahoma law, however, unpublished Court of Appeals opinions are not considered binding and are not to be cited as precedent. See Okla. Stat. tit. 20 § 30.5 (1981).

[7]Due to its resolution of the property interest question, the district court did not reach this issue. Defendants offer it as an alternative ground on which to uphold the grant of summary judgment, and we therefore address this issue's merits on appeal. Some of the defendants also argue on appeal that they are protected by immunity. We believe this issue is best developed in the first instance in the trial court.

APPENDIX E: OPINION BELOW

83-2331 - MARGARET A. WOLFENBARGER d/b/a SHADY SAM'S PAWN SHOP v. CLANCY WILLIAMS, et al.

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the majority position because I am not convinced that we should decide the due process issue on the basis of this summary judgment record, and as an issue not decided by the trial court. I would remand to the trial court.

If the due process issue is to be decided I would apply Parratt v. Taylor, 451 U.S. 527, and Hudson v. Palmer, 468 U.S. ____, 52 U.S.L.W. 5052, and thus would depart from the majority opinion. I also no longer agree with the majority opinion in Lavicky v. Burnett, 758 F.2d 468 (10th Cir.), relied on by the majority opinion herein, although I was on the panel in that case, since I now see the error of my ways.

The Fourteenth Amendment due process clause is, of course, not intended to protect citizens from deprivations of property by individuals whether they be public employees or

officials. The protection afforded is only against the state itself.

The problem which immediately arises in an examination of a deprivation of property incident, as in the case before us, is that it is difficult to keep the focus on the state itself in the "random" and "unauthorized" evaluations of pre-deprivation conduct as directed by the Supreme Court in Parratt v. Taylor and Hudson v. Palmer, and not to let the focus slip back to the point of view of the employees involved in the incidents. The individuals are the actors and the defendants and the first impulse is to evaluate especially the "random" element from their position.

The "random" and "unauthorized" conduct from the position of the state is demonstrated in Hudson in the intentional deprivation there concerned, but from the position of the employee it was there not random but intentional and planned. In the case before us the action of the officials from their point of view was not random but intended and planned. However, in looking at the acts from the position of the state itself, as we must, the acts were random,

unexpected and unpredictable. They were such that pre-deprivation due process was "impracticable" as in Hudson. As the Court there said:

> "Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process."

The random elements of Hudson are thus present and we are not concerned with the alternative need for quick action.

The Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, was concerned with an act of a state agency in setting plaintiff's hearing date on a discharge claim beyond the time provided by state law. The state court held that, since it was beyond the statutory time, the agency conducting the hearing was without jurisdiction. The Supreme Court held the late setting was a direct action of the state agency in terminating plaintiff's right to a hearing. The operation of the state machinery itself was the fault. The court refers to "state procedure," and to the term in Parratt used in contrast to a random act by a state employee,

but this is a narrow concept as the case includes only statutory dates and hearings. The Court so indicates in Logan after a reference to Parratt's mention of "established state procedure":

> "Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference--whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545 (second concurring opinion). Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards."

In my view, when the focus is on the state the deprivation of the property was just as "random" here as it was in Hudson. As the Court said in Parratt:

> "The loss of property, although attributable to the State as action under 'color of law', is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing requirement have rested in

> part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities."

Even if the Logan decision is vastly expanded, we have here no "established state procedure" which was followed. Instead there is a letter from the District Attorney suggesting that items believed to be stolen found in pawnshops should be seized and taken to the police station. There is also a form signed by an Assistant District Attorney authorizing the delivery of the property so seized (and other property) to the person claiming ownership. The form was for the release of "evidence," but there was no case. There was no determination of the rights of plaintiff by a hearing or otherwise. No one was identified as the thief nor was anyone prosecuted for a theft of the items reported stolen. No action was filed. The identity of the person who pawned the property was also never established. The serial numbers on the property reported stolen by Mr. Loggens and on the pawned items matched.

Although in my view it is not significant, I cannot agree with the characterization of the

District Attorney as a "policymaking state official." In Oklahoma there is no chief law enforcement officer among the county officials. The sheriff and the District Attorney are on a par as to this function and are to assist each other in the performance of law enforcement duties. The District Attorney has the duty to "prosecute all actions for crime committed in his district," and defend civil actions brought against the counties. The District Attorney is to give advice to county officials. He is elected on a district-wide basis. There appears to be no indication in the statutes that the District Attorney is to give advice to city and town police departments. But he or she is to prosecute violations of the state criminal laws which take place in his district. His policymaking seems to be limited to deciding whether to prosecute or not.

Thus, even if the District Attorney is a policymaker in directing the disposition of property contrary to state statutes, he is not the "state" for the purpose of the Fourteenth Amendment. He is at best a public employee

directing action contrary to state law in a random way.

As indicated in the majority opinion, the trial court decided only the property interest issue, and found none to support the action. The proceedings were cut short and no other issues were considered. Under the admonitions of Parratt and Hudson the examination of the due process question, in my view, is not completed and cannot be completed on this record which at the most describes some pre-deprivation process.

I see no indication in the decision on the particular issue before us nor in the basic Fourteenth Amendment opinions which would permit us to characterize these decisions by district or county officials as actions by the state itself within the Logan decision. The action of the Assistant District Attorney here concerned in directing the release of the property to Mr. Loggens without any determination as to the rights of the plaintiff should not be regarded as a statement of policy, if that is significant, nor be considered as "established

state procedure" as the term is used in Parratt. The action instead was a random act by the official as far as the state is concerned and as far as the Fourteenth Amendment is concerned.

There are innumerable levels of policymaking in state and local government including that made in local police departments. As considered in this context all public employees are "policymakers" in some of their functions. It is difficult to see how this "policy" can become "established state procedure" without doing violence to the Fourteenth Amendment and to the Hudson and the Logan opinions.

The characterization of the acts of local employees as "policymaking" as a device to place the considerations of process into the pre-deprivation category only is not responsive to Hudson and Logan. It destroys the balance between state and federal courts in the determination of the basic issues.

I would remand the case to complete the due process evaluation by an examination of post-deprivation remedies.

APPENDIX F

[Filed in the District Court of Comanche County, Oklahoma, on November 10, 1982.

IN THE DISTRICT COURT IN AND FOR

COMANCHE COUNTY, OKLAHOMA

Margaret A. Wolfenbarger, d/b/a Shady Sam's Pawn Shop, Plaintiff,	)	
vs.	)	No. C-80-1081
Clancy Williams, Defendants.	)	

D I S M I S S A L

Comes now the plaintiff and dismisses the above entitled cause without prejudice.

/s/ Warren H. Crane
Warren H. Crane
Attorney for Plaintiff

I, JANICE MITCHELL, District Court Clerk in and for Comanche County, Oklahoma, hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the Court Clerk's office of Comanche County, Oklahoma, this 27 day of Dec. 1985. (SEAL)

JANICE MITCHELL, District Court Clerk

By /s/ Julie Tully Deputy

CERTIFICATE OF SERVICE

I, Gerald S. Rakes, counsel for petitioners herein, Clancy Williams, Loy Bean, Robert L. Gillian and the City of Lawton, Oklahoma, hereby certify that, on this 3rd day of January, 1986, I served two copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Margaret A. Wolfenbarger, respondent herein, by depositing such copies in the United States Post Office, Lawton, Oklahoma, with first class postagae prepaid, properly addressed to the Post Office address of Warren H. Crane, the above-named respondents's counsel of record, 812 S.W. D Avenue, Lawton, Oklahoma 73501; and to the Post Office address of Robert A. Nance, Assistant Attorney General Deputy Chief, Oklahoma, Criminal and Federal Divisions, Counsel of Record for Richard Tannery and Robert Perrine, petitioners herein, 112 State Capitol Building, Oklahoma City, Oklahoma 73105.

All parties required to be served have been served.

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